

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PROSPECT CAPITAL CORPORATION, :
PROSPECT CAPITAL MANAGEMENT LLC, :
JOHN F. BARRY, M. GRIER ELIASEK, :
WALTER PARKER and BART DE BIE, :
: 08 CV 03721 (LBS)
Petitioners, :
: (ECF CASE)
- against - :
: Electronically Filed
MICHAEL ENMON, :
Respondent. :
: :
----- x

**DECLARATION OF TIMOTHY GRAHAM NELSON IN SUPPORT
OF MOTION TO CONFIRM A FINAL ARBITRATION AWARD**

I, TIMOTHY G. NELSON, hereby declare under penalty of perjury:

1. I am a member of the Bar of this State and the firm of Skadden, Arps, Slate, Meagher & Flom LLP, counsel for Petitioners Prospect Capital Corporation, Prospect Capital Management LLC, John F. Barry, M. Grier Eliasek, Walter Parker and Bart De Bie.

2. In connection with the Petitioners' Motion to Confirm a Final Arbitration Award, I attach true copies of the following documents:

<u>Ex.:</u>	<u>Date:</u>	<u>Document:</u>
1	August 23, 2008	Final Arbitral Award by John H. Wilkinson, Esq., in <i>Prospect Energy Corporation et al. v. Michael Enmon</i> , American Arbitration Association.

2

August 20, 2008

Corrected Order in *Prospect Energy Corp. et al.*
v. Enmon, 07-1047-cv (2d Cir. 2008)

Dated: New York, New York
September 3, 2008

A handwritten signature in black ink, consisting of a series of fluid, connected loops and strokes, representing the name Timothy G. Nelson.

TIMOTHY G. NELSON



American Arbitration Association
Dispute Resolution Services Worldwide

Northeast Case Management Center
Catherine Shanks
Vice President
Christopher Fracassa, Yvonne L. Baglini
Assistant Vice Presidents

August 26, 2008

950 Warren Avenue, East Providence, RI 02914
telephone: 866-293-4053 facsimile: 401-435-6529
internet: <http://www.adr.org/>

VIA FIRST CLASS MAIL

Maura Grinalds
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
29th Floor, Room 424
New York, NY 10036

Jason A. Itkin
Arnold & Itkin LLP
1401 McKinney St Ste 2550
Houston, TX 77010

Re: 13 148 02866 06
Prospect Energy Corporation / Bart De Bie / John
Barry / M. Eliasek / Walter Parker / Prospect Cap
ital Management LLC
and
Michael Enmon

Dear Counsel:

Enclosed please find the hard copy of the Award for this matter, previously transmitted to you via email on August 26, 2008. Please note that the case file will be destroyed fifteen (15) months after the date of this letter.

Sincerely,

Jennifer Metz
Case Manager
401 431 4795
MetzJ@adr.org

Supervisor Information: Joyce A. Sutton, 401 431 4730, Suttonj@adr.org

Encl.

cc: John H. Wilkinson, Esq.

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

x

PROSPECT ENERGY CORPORATION,
PROSPECT CAPITAL MANAGEMENT LLC,
JOHN F. BARRY, M. GRIER ELIASEK, WALTER
PARKER AND BART DE BIE,

Claimants,

vs.

Case No.:
13 148 02866 06

MICHAEL ENMON,

Respondent.

x

FINAL ARBITRATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the parties, dated April 11, 2006, and having been duly sworn, and having duly heard the proofs and allegations of the parties and having previously rendered a Partial Final Award dated April 14, 2008, do hereby render the following Final Arbitration Award:

1. The Partial, Final Arbitration Award which was previously entered in this arbitration by the undersigned Arbitrator on April 14, 2008 is incorporated herein and made a part of this Final Arbitration Award.
2. Claimants' claim that they are entitled to their costs and attorneys' fees reasonably incurred in the following legal proceedings is granted:
 - The third-party complaint filed by Michael Enmon in Texas state court proceedings captioned Robert Fiser Attorney at Law P.C. v. Michael Enmon, Cause No. B-0177745, Jefferson County, Texas ("Texas Action").
 - The action brought by Claimants against Michael Enmon in the United States District Court for the Southern District of New York to compel arbitration pursuant to the terms of the parties' April 11, 2006 Letter

Agreement, captioned Prospect Energy Corp., et al. v. Enmon, No. 07 Civ. 117 (RLC).

- Michael Enmon's appeal in the United States Court of Appeals for the Second Circuit (No. 07-1047-CV) from the Honorable Leonard B. Sand's February 13, 2007 order compelling arbitration and enjoining the Texas Action.
 - Michael Enmon's motion dated July 12, 2007 in the United States District Court for the Southern District of New York seeking Rule 60(b) relief so as to permit his company "Caprock Pipe & Supply Inc." to sue the Claimants in this arbitration in New York state court in connection with the same transactions which were the subject of the Arbitration ("Rule 60(b) Motion"), and
 - The appeal in the United States Court of Appeals for the Second Circuit (No. 07-3632-CV) from Judge Sand's July 24, 2007 Order denying the Rule 60(b) Motion.
3. Section 10 of the April 11, 2006 Letter Agreement between Prospect Energy Corporation ("Prospect") and Michael Enmon ("Letter Agreement") provides that the "losing party" in an arbitration for which the Letter Agreement provides is to pay the legal and related fees and expenses of the "prevailing party". Prospect is the prevailing party in this arbitration and, hence, is entitled under the terms of Section 10 to recover from Michael Enmon the legal and related fees and expenses which were reasonably incurred by it in connection with this arbitration.
4. Pursuant to paragraphs 2 and 3 above, Respondent is immediately to pay attorneys' fees to respective Claimants in the total amount of One Million, Eight Hundred Thousand Dollars and Zero Cents (\$1,800,000.00). Simple, annual interest on any unpaid portion of this \$1,800,000.00 shall run at the rate of 9% from October 1, 2008 forward.

5. Pursuant to paragraphs 2 and 3 above, Respondent is to pay costs and expenses to respective Claimants in the total amount of Four Hundred Fifty Thousand Dollars and Zero Cents (\$450,000.00). This amount does not include Arbitrator fees and administrative fees of the American Arbitration Association, which are separately assessed below. Simple annual interest on any unpaid portion of this \$450,000.00 shall run at the rate of 9% from October 1, 2008 forward.
6. The fees of the Arbitrator totaling \$57,200.00 are to be borne 100% by Respondent.
7. The administrative fees of the American Arbitration Association totaling \$16,500.00 are to be borne 100% by Respondent.
8. Therefore, Respondent shall reimburse Claimants the sum of \$30,475.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Claimants.
9. This Final Arbitration Award is in full settlement of all claims submitted to this arbitration. To the extent any such claim is not specifically mentioned herein, it is denied.

 8/23/08
John Wilkinson Dated

I, John Wilkinson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Arbitration Award.

 8/23/08
John Wilkinson Dated



American Arbitration Association
Dispute Resolution Services Worldwide

950 Warren Avenue
East Providence, RI 02914

STMT DATE	AMOUNT DUE
08/26/2008	2800.00
CASE#	
13-148-02866-06 01 JEME-R	

Payment Due Upon Receipt

INVOICE/STATEMENT

Maura Grinalds
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
29th Floor, Room 424
New York NY 10036

Representing Prospect Energy Corporation / Bart De Bie / John
Re: Michael Enmon

Please Detach and Return with Payment to the Above Address

Please Indicate Case No. on check



American Arbitration Association
Dispute Resolution Services Worldwide

950 Warren Avenue
East Providence, RI 02914

NAME Maura Grinalds
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
29th Floor, Room 424
New York NY 10036

Representing Prospect Energy Corporation / Bart De Bie / John
Re: Michael Enmon

STMT DATE	CASE#	PREVIOUS BALANCE	CURRENT CREDITS	NEW CHARGES	TOTAL BALANCE DUE
08/26/2008	13-148-02866-06 01 JEME-R	0.00	32200.00-	35000.00	2800.00

DATE	REF#	DESCRIPTION	AMOUNT	CREDITS	BALANCE
12/22/2006	9385739	Initial Administrative Fee	950.00		
12/22/2006	VQCA0D54217C	Payment recvd from : Daria Becker Barry		950.00 -	
02/15/2007	9411631	Case Service Fee	300.00		
03/02/2007	1338914	Payment recvd from : SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP		300.00 -	
02/20/2007	9413201	Your Share of the Neutral Compensation Deposit covering 24 hours of Study	3900.00		
04/20/2007	214079	Payment recvd from : M/W Prospecten Energy		3900.00 -	
04/20/2007	214079	Reall., Chk# 000214079	625.00		
05/05/2008	1376364	Payment recvd from : SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP		625.00 -	
10/03/2007	9528888	Your Share of the Neutral Compensation Deposit covering 64 hours of Hearing	10400.00		
10/31/2007	1359743	Payment recvd from : SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP		10400.00 -	
10/03/2007	9528890	Your Share of the Neutral Compensation Deposit covering 40 hours of Study	6500.00		
10/24/2007	1359351	Payment recvd from : SKADDEN, ARPS, SLATE, MEAGHER & FLO		3900.00 -	

Remarks: For any inquiry please call: 401-431-4795
This is a full statement showing all financial activity on this case.

TOTAL BALANCE DUE	2800.00
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Please Indicate Case No. on check

INVOICE SUMMARY:	NET BILLED	NET PAID	NET DUE
INITIAL/COUNTER-CLAIM FEES	1250.00	1250.00	0.00
HEARING/POSTPONEMENT/ROOM/PROCESSING FEES	625.00	625.00	0.00
REALLOCATION AT CASE END FEES	0.00	0.00	0.00
NEUTRAL COMPENSATION/EXPENSES	28600.00	25800.00	2800.00
			EIN: 13-0429745



American Arbitration Association
Dispute Resolution Services Worldwide

950 Warren Avenue
East Providence, RI 02914

STMT DATE	AMOUNT DUE
08/26/2008	2800.00
CASE#	
13-148-02866-06 01 JEME-R	

Payment Due Upon Receipt

INVOICE/STATEMENT

Maura Grinalds
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
29th Floor, Room 424
New York NY 10036

Representing Prospect Energy Corporation / Bart De Bie / John
Re: Michael Enmon

Please Detach and Return with Payment to the Above Address

Please Indicate Case No. on check



American Arbitration Association
Dispute Resolution Services Worldwide

950 Warren Avenue
East Providence, RI 02914

NAME Maura Grinalds
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
29th Floor, Room 424
New York NY 10036

Representing Prospect Energy Corporation / Bart De Bie / John
Re: Michael Enmon

STMT DATE	CASE#	PREVIOUS BALANCE	CURRENT CREDITS	NEW CHARGES	TOTAL BALANCE DUE
08/26/2008	13-148-02866-06 01 JEME-R	0.00	32200.00-	35000.00	2800.00

DATE	REF#	DESCRIPTION	AMOUNT	CREDITS	BALANCE
10/24/2007	1359351	Reall., Chk# 001359351	3900.00		
10/31/2007	1359743	Payment recvd from : SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP		6500.00 -	
03/05/2008	9598060	Your Share of the Neutral Compensation Deposit covering 30.76 hours of Study	5000.00		
10/24/2007	1359351	Payment recvd from : Reall., Chk# 001359351		3900.00 -	
03/31/2008	1373522	Payment recvd from : SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP		1100.00 -	
04/08/2008	9614428	Rental Fee for AAA Hearing Rooms for July 23 through 27th, 2007	625.00		
04/20/2007	214079	Payment recvd from : Reall., Chk# 000214079		625.00 -	
08/21/2008	9677777	Your Share of the Neutral Compensation Deposit covering 17.23 hours of Study	2800.00		2800.00

Remarks: For any inquiry please call: 401-431-4795
This is a full statement showing all financial activity on this case.

TOTAL BALANCE DUE	2800.00
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Please Indicate Case No. on check

INVOICE SUMMARY:	NET BILLED	NET PAID	NET DUE
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HEARING/POSTPONEMENT/ROOM/PROCESSING FEES	625.00	625.00	0.00
REALLOCATION AT CASE END FEES	0.00	0.00	0.00
NEUTRAL COMPENSATION/EXPENSES	28600.00	25800.00	2800.00

EIN: 13-0429745

SDNY / NYNY
07-cv-117
Carter07-1047-cv
Prospect Energy Corp. v. EnmonUNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CORRECTED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August, two thousand and eight.

PRESENT:

HON. JON O. NEWMAN,
HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER,
Circuit Judges,



PROSPECT ENERGY CORPORATION, PROSPECT CAPITAL MANAGEMENT LLC,
JOHN F. BARRY, M. GRIER ELIASEK, WALTER PARKER and BART DE BIE,

Petitioners-Appellees,

-v.-

No. 07-1047-cv

MICHAEL ENMON,

Respondent-Appellant,

1 Submitted for Petitioners-Appellees: MAURA BARRY GRINALDS (Jonathan J. Lerner,
2 Timothy G. Nelson *on the brief*), Skadden, Arps,
3 Slate, Meagher & Flom LLP, New York, N.Y.

4
5 Submitted for Respondent-Appellant: GREGORY S. COLEMAN (Kurt B. Arnold, Jason
6 A. Itkin, Caj. D. Boatright, Arnold & Itkin LLP,
7 Houston, Tex., and Marc S. Tabolsky, Yetter &
8 Warden LLP, Austin, Tex., *on the brief*), Yetter &
9 Warden LLP, Austin, Tex.

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12 **UPON DUE CONSIDERATION** of this appeal from a judgment entered in the United
13 States District Court for the Southern District of New York (Sand, *J.*), it is hereby **ORDERED,**
14 **ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**
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17 In April 2006, Michael Enmon entered into an agreement with Prospect Capital Corp.
18 (“Prospect”) to negotiate a possible loan. This letter agreement contained an arbitration
19 provision requiring Enmon to submit disputes to binding arbitration in New York City and
20 provided that state or federal courts located in New York County would have exclusive
21 jurisdiction of any claims or disputes arising under the letter agreement not subject to arbitration.
22 Enmon subsequently filed suit against Prospect, Prospect Capital Management LLC, and certain
23 officers (collectively “Appellees”) in Texas state court. Prospect then brought suit in the
24 Southern District of New York seeking to compel arbitration and to stay the state court
25 proceeding in Texas. The District Court (Sand, *J.*) entered an order compelling arbitration and
26 enjoined the Texas action. Enmon timely filed an appeal. We assume the parties’ familiarity
27 with the facts, procedural history, and scope of the issues presented on appeal.

28 On appeal, Enmon raises three main issues. He argues (1) that the parties never entered
29 into a binding contract and so the arbitration clause cannot be binding, (2) that the arbitration

1 clause in the letter agreement is unconscionable and therefore unenforceable, and (3) that the
2 district court erred in finding that the arbitration clause was supported by consideration.

3 We affirm the judgment of the District Court regarding the existence of the contract itself
4 for essentially the reasons stated in its ruling. With respect to the arbitration clause, Appellees
5 conceded in their briefs that the arbitration clause bound them to arbitrate once the proceeding
6 began and that the meaning of this arbitration clause was subject to interpretation by the
7 arbitrator. In light of these concessions, we affirm without reaching the issue of the enforceability
8 of the arbitration clause.

9 We have considered all of Enmon's claims, and we find them to be without merit.
10 Accordingly, we AFFIRM the judgment of the District Court.
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FOR THE COURT:

Catherine O'Hagan-Wolfe, Clerk of Court

By: 